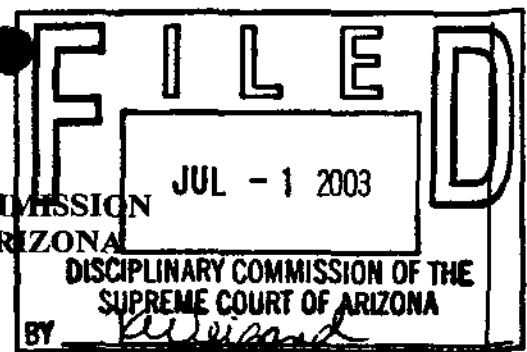


BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A NON-MEMBER)
OF THE STATE BAR OF ARIZONA,) No. 01-1927

GEORGE L. MOTHERSHED,)
DISCIPLINARY COMMISSION
REPORT

RESPONDENT.)

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on June 21, 2003, pursuant to Rule 53(d), Ariz. R. S. Ct., for consideration of the Hearing Officer's Report, filed April 21, 2003, recommending censure and costs of these disciplinary proceedings.

Decision

The Commission's standard of review is set forth in Rule 53(d)2, which states that the Commission reviews questions of law *de novo*. In reviewing findings of fact made by a hearing officer, the Commission applies a clearly erroneous standard.

Having found no findings of fact clearly erroneous, the nine members of the Commission unanimously recommend adopting and incorporating by reference the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure. Both the Hearing Officer and the Commission agree that disbarment would be the appropriate sanction for Respondent's conduct if he were a member of the Bar. Because he is not, the greatest sanction the Commission believes it is authorized to impose is a censure.

1 The assessment of costs is *not* recommended. The State Bar's Statement of Costs
2 and Expenses was untimely. It did not comply with Rule 52(a)8, which provides that the
3 statement of costs *shall* be filed within seven days.¹

4 RESPECTFULLY SUBMITTED this 1st day of July 2003.

5 

6 Jessica G. Funkhouser, Chair
7 Disciplinary Commission

8 Ad Hoc Commissioner Messing concurring:

9 I agree with the Commission's decision to adopt the Hearing Officer's findings. I
10 also agree that Respondent's actions warrant disbarment. I write separately only because I
11 do not believe it is clear that the maximum sanction available in this case is censure.
12 Supreme Court Rule 46(b) expressly states that the Supreme Court's power to impose
13 discipline extends to non-lawyers who practice law in this state.

14 A non-member engaged in the practice of law in the State of
15 Arizona...thereby submits himself or herself to the
16 disciplinary and disability jurisdiction of this court in
17 accordance with these rules.

18 Supreme Court Rule 51, which specifies the various grounds for discipline, similarly
19 states that it applies equally to members. Ariz. S. Ct. R. 51 ("Grounds for discipline of
20 members and nonmembers shall be misconduct as follows . . ."). Supreme Court Rule 52
21 which specifies the types of sanction available for misconduct, ranging from disbarment to
22 informal reprimands, probation and diversion, does not distinguish between members and
23 nonmembers.

24
25
26 ¹ The Hearing Officer's report was filed April 21, 2003, and the State Bar's Statement of
Costs and Expenses was filed May 1, 2003.

1 In the past, the commission has taken the position, as it does again today, that
2 censure is the maximum sanction available because it is logically impossible to suspend or
3 disbar someone who is not a member of the bar. *See, e.g., In re Mothershed*, S.B. 01-
4 0076D, Disciplinary Commission 97-1781 (April 17, 2001); *In re Olson*, 80 Ariz. 5, 881
5 P.2d 337 (1994). Yet the Rules expressly contemplate that there may be cases in which
6 lawyers who have been disbarred are subject to further discipline. *See* Ariz. S. Ct. R. 46(h)
7 (suspended or disbarred lawyers remain subject to Court's jurisdiction with respect to
8 matters occurring prior to suspension or disbarment).

9 Admittedly, in the context of a non-member, the difference between disbarment and
10 censure is one of label only. But as the Supreme Court recognized in *In re Horwitz*, 180
11 Ariz. 20, 881 P.2d 352 (1994), labels are important. In that case, the Court discussed the
12 difference between a five-year suspension and disbarment explaining that it was in the
13 message sent by the label itself.

14 If disbarred, Horwitz cannot practice again until he applies for
15 and is granted readmission, a process unavailable to him for
16 five years from the date of disbarment. He must then pass the
17 bar examination and make a showing of good moral character.
18 *See* Rules 71 and 72. If suspended for five years, he likewise
19 cannot practice law again until five years have passed, he
20 applies for readmission, makes a showing of good moral
21 character and passes the bar examination. *See* Rules 71 and
22 72. One might ask, therefore, what difference it makes
23 whether Horwitz is disbarred or suspended for five years.
24 When presented with this question at oral arguments, Horwitz'
counsel was commendably frank. To Horwitz, he said, it
makes a great deal of difference because there is much more
opprobrium attached to disbarment. We agree and believe
also that disbarment makes one type of statement to the public
and suspension another. This is especially true if a lawyer has
committed a felony within the context of chronic drug abuse.
We acknowledge, therefore, that disbarment is more severe
sanction even if the practical effect is not.

180 Ariz. at 24, 881 P.2d at 356 (emphasis added). With minor modifications, the same
analysis is applicable here. Although the practical effect on Respondent would be the same,

disbarment would send a different and much stronger message to the public than a censure.
Indeed, upon learning that Respondent had been censured, a member of the public might well conclude that he is, in fact, a member of the bar. Labeling the sanction imposed in this case "disbarment" rather than "censure," might therefore do more to protect the public and prevent future harm.

For these reasons, I would recommend that Respondent be disbarred even though he is not now and never has been a member of the Arizona bar.


Jeffrey Messing, Ad Hoc Commissioner

Original filed with the Disciplinary Clerk
this 1st day of July 2003.

Copy of the foregoing mailed
this 1st day of July 2003 to:

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Copy of the foregoing hand-delivered
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/kdl